No. 88-2109

In the Supreme Court of the United States

OCTOBER TERM, 1989

THE STATES OF KANSAS AND MISSOURI, AS *PARENS PATRIAE*,
Petitioners

v.

THE KANSAS POWER & LIGHT COMPANY and
UTILICORP UNITED, INC.,
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF NANCY ALLEVATO, Personal Representative of MICHAEL J. FERRANTINO, SR., DECEASED, *et al.* IN SUPPORT OF PETITIONERS

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March 1, 1990

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**On Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit**

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Nancy Allevato, personal representative of Michael J. Ferrantino, Sr., deceased, *et al.*, hereby respectfully move for leave to file the attached Brief *Amici Curiae* in Support of Petitioners in this case. The consents of the attorney for petitioner the State of Missouri and the attorneys for respondents have been obtained. Consent of the attorney for petitioner the State of Kansas was requested but not obtained.

As more specifically stated in the Brief *Amici Curiae*, the interest of *Allevato, et al.* arises from the fact that they are Petitioners in *Allevato* v. *County of Oakland*, No. 89-56 (U.S. filed July 13, 1989) (*petition for cert. pending*), the outcome of which is likely to be affected by the Court's disposition of this case. Specifically, the Court's disposition of this case will determine whether direct purchasers have standing under Section 4 of the Clayton Act, 15 U.S.C. §15(a), where it was clear from the outset of a transaction that the direct purchasers have passed on 100 percent of all overcharges allegedly resulting from antitrust violations.

The Solicitor General, in his Brief *Amicus Curiae* for the United States in *Allevato*, recommended that the *Allevato* petition for certiorari be held by the Court pending the outcome in the case at bar.

The persons and entities making this motion believe that their participation in litigation similar to this case provides them with a perspective on the questions presented that will be useful to the Court, and that is different from the perspective of the parties.

Respectfully submitted,

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On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICI CURIAE* of NANCY ALLEVATO, Personal Representative of MICHAEL J. FERRANTINO, SR., Deceased, *et al.* IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae are the Petitioners in *Allevato* v. *County of Oakland*, No. 89-56 (U.S. filed July 13, 1989) (*petition for cert. pending*), the outcome of which is likely to be affected by the Court's disposition of this case. *Amici curiae* file this Brief in support of the Petitioners in this case. In *Allevato*, the Michigan counties of Oakland and Macomb (the "Counties"), which purchased sewerage services and various components directly from *amici curiae* and others, sued, alleging a conspiracy to illegally overcharge for the services in violation of the federal antitrust laws and RICO. It is undisputed that the Counties, as required by Michigan statutes, passed on all of the price of sewerage services, including any alleged overcharges, to subsequent purchasers.

In *Allevato*, the plaintiffs/Respondents are direct purchasers who seek to sue for injuries that were passed on by them to indirect purchasers. In the case before the Court, the plaintiffs/Petitioners are indirect purchasers who seek to sue for injuries that were passed on to them by direct purchasers. In deciding whether indirect purchasers may bring suit in this case, the Court is likely to articulate the legal rules that govern *Allevato* as well.[1]

SUMMARY OF ARGUMENT

The very essence of a private cause of action for damages under the federal antitrust laws is to provide relief to any person "who shall be injured in his business or property by reason of anything forbidden in the antitrust laws * * *." 15 U.S.C. §15(a) (1982). Regardless of any policy considerations, a party must have been *injured* in order to maintain an antitrust action. Despite this obvious proposition, the court below held that only direct purchasers have standing to maintain antitrust actions even though the direct purchasers have, by virtue of contractual, regulatory or statutory requirements, suffered no injury because they passed on 100 percent of any allegedly unlawful overcharge to end-user customers — the so-called "perfect" pass on.

The question presented in the case at bar, *Kansas* v. *The Kansas Power & Light Co.*, No. 88-2109 (U.S. filed June 26, 1989), *cert. granted*, 58 U.S.L.W. 3449 (U.S. Jan. 16, 1990), is whether the direct or indirect purchaser has standing to sue defendants (not involved in the case before the Court) where "there is an easily proven, 100% pass-on of illegal overcharges * * *." (Pet. at I). In both this case and *Allevato*, one essential fact is clear — that the direct purchaser suffered no damages because it did not absorb any portion of the alleged unlawful overcharge.

Hanover Shoe, Inc. v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977),

[1]The Solicitor General has recognized that the decision in this case could resolve the issues presented by *Allevato*. *See* Brief for the United States as *Amicus Curiae* in *Allevato* at 8-9. There are also some differences between this case and *Allevato*. *See* discussion, *infra*, at 10-11.

both involved making a *policy* choice: whether to confer standing on the direct purchaser, indirect purchaser, or both in a situation where there were multiple levels in the relevant economic distribution chain and it was determined that some injury was suffered at each level, although the amount of injury at each level was not readily ascertainable. Where damages could have been suffered at each level and where each level could have absorbed a portion of the overcharge, the Court had a policy choice to make as to whether to prefer the direct or indirect purchaser or whether to have trial courts engage in the costly and potentially impossible exercise of apportionment of the damages. In opting to prefer the direct purchaser, the Court took into account various policy considerations.

Such policy considerations, however, are pertinent *only* in situations where both parties were injured by absorbing overcharges. *Illinois Brick* and *Hanover Shoe* do not, however, stand for the proposition that uninjured parties are to be made "preferred surrogates" who can maintain private antitrust actions simply because they are the direct purchasers in an economic chain of distribution. The choice as between direct and indirect purchaser need not, and legally should not, be made where the direct purchaser was not injured.

Efforts by the Sixth and Tenth Circuits to make uninjured direct purchasers surrogate plaintiffs simply because they do not fit within the exact wording of the cost-plus "exception" not only turn the concept of standing on its head, but may result in those surrogates making enforcement decisions which are not consistent with the remedial purposes behind the antitrust laws. Uninjured surrogate plaintiffs are poor private attorneys general because they do not suffer actual monetary loss (the accepted bellwether of antitrust injury) and are not motivated by the need to make themselves whole. Thus, by giving an uninjured direct purchaser the exclusive right to maintain an antitrust action in these circumstances, the Court may actually defeat the remedial purposes behind the antitrust laws, as the uninjured surrogate, having suffered no damages at all, simply may choose not to sue. Because the antitrust laws are intended to compensate victims of antitrust violations for their injuries, *Illinois Brick*, 431 U.S. at 746 (citing

Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-86 (1977)), only the injured persons should be entitled to bring suit.

Allevato and the case at bar are different in that *Allevato* does not involve a situation where a decrease in demand by the indirect purchasers could conceivably harm the direct purchasers by causing a loss in profits. Thus, should the Court rule that the possibility of a decrease in profits due to a decrease in demand because of an overcharge dictates that only the direct purchaser has standing, the Court should still summarily reverse or remand in *Allevato*.

ARGUMENT

I. THE RULE SET FORTH IN *HANOVER SHOE* AND *ILLINOIS BRICK* DOES NOT JUSTIFY ALLOWING UNINJURED DIRECT PURCHASERS IN THE CHAIN OF DISTRIBUTION TO HAVE STANDING.

A. Granting Standing Only to Uninjured Direct Purchasers Ignores the Essential Purposes of Section 4 of the Clayton Act.

The legislative history of Section 4 of the Clayton Act, 15 U.S.C. § 15(a) (1982) and the original treble damages provision, Section 7 of the Sherman Act, 26 Stat. 210 (1890), shows that the treble damages provision was an incentive linked to injury. *See Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-86 & n.10 (1977) (citing legislative history of Section 7 of the Sherman Act). Congress could have legislated a treble damages "bounty" as an incentive for anyone to sue for injury to the marketplace if maintaining the action and penalizing the violator were more important than compensating the victims of antitrust violations.[2] Because Congress linked the treble damages incentive to injury, *see, e.g. Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 262-63 (1972), the Court should not break the linkage by granting standing to the uninjured. This centennial year of the Sherman Act provides a particularly appropriate occasion for this Court to reaffirm and clarify that Section 4 is indeed a remedial provision and cannot in any way be construed to give standing to persons not injured by alleged antitrust violations, while overlooking those who were injured.

When direct and indirect purchasers in the same chain of distribution are subjected to allegedly unlawful overcharges, four possible results could occur. First, the direct purchaser could absorb all the overcharges. Exclusive direct purchaser standing in this situation is beyond dispute. Second, both the direct and the indirect purchasers could absorb a portion of the overcharge, but the amount of each portion is either difficult or impossible to determine. This was the situation in *Hanover Shoe* and *Illinois Brick*, where the direct purchaser in a competitive resale marketplace, in order to maximize profits, absorbed part of the overcharge.[3] The forces determining the amount absorbed by the direct purchaser are the elasticities of supply and demand. The Court in *Hanover Shoe* and *Illinois Brick* determined that the direct purchaser should have standing where apportionment of the damages caused by the overcharges requires an analysis of the complex interaction of these forces. Third, as occurred in the case at bar and in *State of Illinois ex rel. Hartigan* v. *Panhandle Eastern Pipe Line Corp.*, 852 F.2d 891 (7th Cir.) (*en banc*), *cert. denied*, ___ U.S. ___ , 109 S.Ct. 543 (1988), the direct purchaser, because of regulatory or contractual reasons, either must pass on or finds that it is in its economic interest to pass on 100 percent of the alleged overcharge to its customers, yet still faces a possible decrease in profits when the higher price leads to a decrease in demand for its goods or services. The fourth case, such as in *Allevato*, is where

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[2]Other statutes provide "bounties" to "deputized" uninjured persons who bring *qui tam* actions against malfactors. *See, e.g.*, False Claims Act, Section 232, 31 U.S.C. § 3730 (Supp. 1989); *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943); *Public Interest Bounty Hunters* v. *Board of Governors of the Federal Reserve System*, 548 F. Supp. 157, 161 (N.D. Ga. 1982). Such statutes are not linked to injury and demonstrate that Congress could have granted uninjured parties antitrust standing, and the treble damages incentive, if it so desired.

[3]In *State of Illinois ex rel. Hartigan* v. *Panhandle Eastern Pipe Line Corp.*, 852 F.2d 891, 894 (7th Cir.) (*en banc*), *cert. denied*, ___ U.S. ___ 109 S.Ct. 543 (1988), Judge Posner observed that "[t]he optimal adjustment by an unregulated firm to the increased cost of the input will *always* be a price increase smaller than the increase in input cost, and this means that the increased cost will be divided between the two tiers, the direct and indirect purchasers * * *." (emphasis added). In other words the direct purchaser, realizing its customers will purchase less if it charges them higher prices, will determine the minimum amount of the overcharge to absorb so that the loss caused by decreased demand, combined with the absorbed portion of overcharges, will be minimized.

the direct purchaser is fully insulated from any injury, whether the injury results from an overcharge or from lost profits due to decreased demand. The insulation from lost profits due to decreased demand can occur because the direct purchaser is not a profit-making entity or because it has a pre-existing cost-plus contract for a fixed quantity with indirect purchasers.

The only issue before the Court is whether direct purchasers who pass on 100 percent of an allegedly unlawful overcharge (which occurs in the third and fourth scenarios described above) have standing to sue for injuries allegedly resulting from the perfectly passed on unlawful overcharges *and* from any decrease in profits due to decreased demand from the pass on. No reading of *Hanover Shoe* or *Illinois Brick*, which address only overcharges absorbed by both direct and indirect purchasers (the second scenario described above), could justify conferring standing on the direct purchasers in the third or fourth situations. Actions by direct purchasers for injuries clearly and conclusively not sustained by them contravenes the remedial intent of Section 4, and leaves those who are truly injured without effective relief. In addition, the direct purchasers will obtain windfall treble recoveries, which were specifically intended to give the truly injured party the necessary incentive to sue.

The following three subsections discuss in detail the second, third and fourth possible situations, noted above, where a direct purchaser is subjected to an unlawful overcharge.

1. *Hanover Shoe* and *Illinois Brick* Apply Only Where Apportionment of Unlawful Overcharges Cannot Reasonably Be Calculated.

Hanover Shoe and *Illinois Brick* established a rule giving preference to direct purchasers only in the second situation described above, where the direct and indirect purchasers both absorbed part of any allegedly unlawful overcharge, and apportionment of damages between them is impossible or impracticable. The Court specifically stated that apportionment of the overcharges would necessitate resorting to a complex analysis of the interactions of the forces of supply and demand, including an analysis of the

relative elasticities of supply and demand. *See, e.g., Illinois Brick*, 431 U.S. at 732. Where both the direct and indirect purchasers clearly suffered some degree of injury from the alleged overcharge and where any attempt to apportion such damages "would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge — from direct purchasers to middlemen to ultimate consumers," 431 U.S. at 737, the direct purchasers should and would be elevated to the preferred position. The Court noted that "it is unrealistic to think that elasticity studies introduced by expert witnesses will solve the pass on-issue." *Id.* at 742.

The Court made a *policy* decision to prefer direct purchasers. This decision was based on two considerations. First and primary was that of maintaining the efficiency of treble-damages actions. Engaging in "vertical" apportionment, among parties at different levels of the chain of distribution would be either impossible or impractical. The second consideration was assuring vigorous enforcement of the antitrust laws. The Court reasoned that where apportionment of the injury would be costly and indirect purchasers would have a potentially small stake in the litigation, the direct purchaser would be in a better position to vindicate the marketplace through private enforcement of the antitrust laws. *Illinois Brick*, 431 U.S. at 744.[4]

The Court's analysis of these important public policy considerations undertaken in *Illinois Brick* and *Hanover Shoe* is unnecessary in the case at bar and in *Allevato* because neither case involves different parties along an economic chain of distribution who are claiming to have suffered *the same* injury from absorbing an overcharge, or a part thereof. In both cases it was apparent from the outset which party in the distribution chain absorbed the alleged unlawful overcharges.[5] Thus, the reason for elevating

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[4]The Court found this consideration secondary to the former, "ease of apportionment" consideration. *See Illinois Brick*, 431 U.S. at 732 n.12; *California v. ARC America Corp.*, 490 U.S. ___, ___ n.6, 109 S.Ct. 1661, 1666 n.6 (1989).

[5]It cannot be argued that the simple determination of a perfect pass on implicates the complexities giving rise to the rule in *Hanover Shoe* and *Illinois Brick*. *See Pauhandle*, 852 F.2d at 898 ("we know that the whole overcharge was passed on to the customers * * *").

the direct purchaser to a preferred position evaporates. *See Hanover Shoe*, 392 U.S. at 494; *Illinois Brick*, 431 U.S. at 732 n. 12.

2. As Petitioners Argue, Whenever a Perfect Pass On of 100 Percent of an Overcharge Occurs, Indirect Purchasers Should Have Standing to Sue for the Overcharge.

The forces necessitating the policy choice made in *Hanover Shoe* and *Illinois Brick* for exclusive direct purchaser standing for all injuries (including injuries from paying the overcharge and injuries caused by a decrease in sales) are not present in all situations, and are not present in the case at bar and in *Allevato*. To ignore these situations and grant the direct purchaser exclusive standing simply because a transaction lacks the "fixed-quantity" element would make the goals of the antitrust laws less likely to be met. *Panhandle* recognized this and held that even in the absence of a cost-plus contract for a "fixed quantity," the direct purchaser should not be a surrogate plaintiff where the effect of the overcharge can be determined in advance without reference to the interaction of supply and demand. Clinging to terms such as "fixed-quantity" as a talismanic substitute for analysis of the true economic structure of the transaction at issue leads to illogical and improper results. *See Panhandle*, 852 F.2d at 893.[6]

[6]Given the lack of guidance in applying the rule established in *Hanover Shoe* and *Illinois Brick*, lower courts have ignored the rationale behind the policy choice for direct purchaser standing and the "exceptions" thereto and have engaged in illogical, result-oriented reasoning to grant standing to direct purchasers. The Sixth Circuit in *County of Oakland* is a prime example. Although the Sixth Circuit acknowledged that "100% of the charges [and alleged overcharges] imposed by Detroit [on the Counties] were passed on by the [Counties] to the municipalities, which would make the [Counties] a 'conduit' in an economic sense," 866 F.2d at 845, the court, ignoring injury altogether, still found that the complexities of apportioning the damages *among* purchasers at the *same level* of distribution would "invite precisely the sort of complexities, uncertainties, and other untoward consequences that the indirect purchaser rule was designed to avoid." 866 F.2d at 849. To carry this rationale to its logical conclusion would emasculate federal class action suits in any situation where the apportionment of damages among the members of the injured class would be complex or uncertain. Even aside from the fact that the Counties absorbed no portion of the overcharge, the court's application of the "apportionment consideration" was incorrect. The complexities giving rise to the "direct purchaser rule" in *Hanover Shoe* and *Illinois Brick* stemmed from the nearly impossible task of analyzing the forces of supply and demand in apportioning damages among purchasers on *different levels* of an economic distribution chain. (*Allevato* Pet. at 16). Moreover, the Sixth Circuit, in its discussion of constitutional standing, found that the Counties were harmed because the alleged overcharges *may* have deterred businesses or individuals from remaining in and/or relocating to the Counties. These types of "injuries," if they be injuries at all, are simply not cognizable under the antitrust laws. (*Id.* at 11-12, 23; *Allevato* Reply at 5-6).

The example of the cost-plus exception in *Hanover Shoe* and *Illinois Brick* was the Court's recognition that situations exist where:

> The effect of the overcharge is essentially determined in advance, without reference to the interaction of supply and demand that complicates the determination in the general case.

431 U.S. at 736; *see also Hanover Shoe*, 392 U.S. at 494. There is no indication that the cost-plus "exception" was intended to be an exclusive exception to the direct purchaser rule. *See Panhandle*, 852 F.2d at 893. The non-exclusivity of exceptions to direct purchaser standing is further shown by the fact that the Court suggested another exception, the "control" exception (*e.g.*, the direct purchaser is owned or controlled by the indirect purchaser), *see Illinois Brick*, 431 U.S. at 736 n.16, where the policy considerations favoring the prohibition of the pass on theory are inapplicable. *See* Note, *Limiting a Regulated Pass On Exception to Illinois Brick*, 62 St. John's L. Rev. 647, 657 (1988); *see also Royal Printing Co. v. Kimberly-Clark Corp.*, 621 F.2d 323, 326 n.4 (9th Cir. 1980). In fact, all this "exception" recognized is the more general rule that only the injured can sue. "Cost-plus" was merely used as a label for an economic circumstance where a lower court could assume that an overcharge caused no injury to the direct purchaser because the lower court could be assured that no injury was left with the direct purchaser. The cost-plus "exception" thus was an example of a circumstance where the economic reasoning behind the direct purchaser rule does not apply and therefore indirect purchasers would not be precluded from maintaining an antitrust action. This case and *Allevato* present two other such circumstances.

3. Direct Purchasers, Such as Those in *Allevato* May Be Fully Insulated Against All Injuries.

The fourth scenario discussed above is an even more perfect pass on than that presented in this case; the indirect purchasers suffer all of the injury, while the direct purchasers suffer none. It is possible that the Respondent direct purchasers, which are profit-making utilities, suffered a decrease in profits due to end-users decreasing their demand for natural gas because of the increased price. Direct purchasers in some circumstances, however, do not suffer a loss of profits because they are prevented, by statute, by their charters or otherwise, from retaining a profit or excess revenue. This fact pattern is presented in *Allevato*, where the direct purchaser Counties are statutorily prohibited from collecting more than their costs.[7] The non-profit nature of the Counties is a substitute for the fixed quantity element discussed in *Illinois Brick*, which, in the words of the Court, "insulate[s] [the direct purchaser] from any decrease in its sales as a result of attempting to pass on the overcharge * * *." 431 U.S. at 736. The Counties are "insulated", that is, completely unaffected by any decrease in "sales", because they are statutorily prohibited from making a profit and their economic well being does not depend on the level of purchases of sewerage services.

The Seventh and Tenth Circuits are in harmony on the proposition that where no issue of injury due to decreased demand exists, a perfect pass on of overcharges justifies standing for indirect purchasers, not direct purchasers. Only the Sixth Circuit refuses to permit use of the pass on theory in such situations. *County of Oakland* v. *City of Detroit*, 866 F.2d 839, 849, 852 (6th Cir. 1989), *pets. for cert. pending sub nom.*, *Allevato* v. *County of Oakland*, Nos. 89-56, 89-79, 89-101.

The issue of whether loss of profits by the direct purchaser due to a decrease in demand precludes use of the pass on theory was

[7] "[S]ituations occasionally arise which fail to fit with the Supreme Court's established exceptions, yet the overcharge seems to have passed through without any real threat of economic injury to the middleman. *See, e.g., County of Oakland* v. *City of Detroit* 628 F. Supp. 610, 613 (E.D. Mich. 1986) * * *." Note, *Limiting a Regulated Pass On Exception to Illinois Brick*, 62 St. John's L. Rev. 647, 659 n.55 (1988).

the source of conflict between the Seventh Circuit and the Tenth Circuit. In *Panhandle*, Judge Posner reasoned that the element of damages caused by the decrease in demand is a completely different transaction, which may give rise to a suit by the direct purchasers, but should not preclude a suit by the indirect purchasers for the amount of the overcharge paid by them. 852 F.2d at 897. *Panhandle* observed that the true concern in *Illinois Brick* and *Hanover Shoe* arose when the direct and indirect purchasers were complaining about the *same* losses. 852 F.2d at 896-97. The Tenth Circuit below, *In re Wyoming Tight Sands Antitrust Cases*, 866 F.2d 891 (10th Cir. 1989), *cert. granted*, 58 U.S.L.W. 3349 (U.S. Jan. 16, 1990) (No. 88-2109), however, reasoned that the complexity of computing the loss of profits caused by a decrease in demand still justifies conferring standing only on the direct purchaser, even though the direct purchaser recovered, through a perfect pass on, 100 percent of the amount by which it was allegedly overcharged.

Therefore, even if this Court determines that the presence of injury due to a decrease in demand justifies granting standing to only direct purchasers, it should not foreclose the possibility of using the pass on theory in situations such as that in *Allevato*. The direct purchasers in *Allevato* not only passed on 100 percent of all overcharges, but were also insulated against any possible decrease in profits due to a decrease in demand because such decrease in demand was of no economic consequence to the direct purchasers.

B. Effective Enforcement of the Private Remedy Provisions of the Antitrust Laws Would Be Impaired By Granting Standing to Only Uninjured Direct Purchasers.

Elevating the uninjured direct purchaser to the preferred position of surrogate plaintiff here would completely destroy the remedial purposes of Section 4.[8] Treble damages were conceived not only to punish but, in the words of Senator Sherman, to counterbalance "the difficulty of maintaining a private suit against a com-

[8] *See also* Brief for the United States as *Amicus Curiae* in *Kansas* (Pet. for Cert.) at 10-11.

bination * * *." 21 Cong. Rec. 2456 (1890). The trebling of damages provision thus provided a safety net to ensure that persons whose injuries were comparatively small could still be made whole.[9] In the case of an uninjured direct purchaser, who need not be "made whole," the treble damages provision, while giving the direct purchaser some incentive to sue, does so at the expense of leaving the truly injured without any remedy. In *Hanover Shoe* and *Illinois Brick*, the incentive to sue and reward of treble damages at least went to a party that suffered some injury.

The goal of effective enforcement of the antitrust laws would be ill served by permitting *only* direct purchasers to sue in the presence of a perfect pass on. Specifically, a direct purchaser who perfectly passes on the effects of an overcharge would have no economic incentive to closely monitor the price of inputs and to sue if it detects an overcharge, because it does not have an economic interest in the price of goods or services subject to the unlawful overcharge.[10] Such a direct purchaser may, of course, have an incentive to sue brought about by the prospect of recovering trebled windfall damages — but this is not a proper incentive recognized in the antitrust laws. If, on the other hand, the direct purchaser was forced, pursuant to a statutory or regulatory requirement, to return any recovery, it would similarly lack any incentive to sue and become embroiled in complex litigation because it could not retain the fruits of victory. Whether the direct purchaser chose to sue or not to sue would be based on considerations other than making themselves "whole" — the underlying rationale of the remedial provisions of the antitrust laws. More likely than not, in the case of a regulatory perfect pass on, the direct purchasers, balancing the monetary and psychological costs of modern litigation against the result of being forced to pass on its recovery, would opt not to sue. Thus, the truly injured receive nothing because they are precluded from suing

[9]Other safety nets to assure that the antitrust laws will be enforced are *parens patriae* actions, *see* 15 U.S.C. § 15c (Supp. 1989), and class actions pursuant to Fed. R. Civ. P. 23, *see Hawaii*, 405 U.S. at 266.

[10]*See* Brief of the United States as *Amicus Curiae* in *Kansas* (Pet. for Cert.) at 11.

and the antitrust violator keeps all of its ill-gotten gain. This is clearly not the result envisioned by the drafters of the antitrust laws.

C. *Amici Curiae* Are Not Asking the Court to Carve Out Exceptions for Particular Markets.

Recognizing standing for indirect purchasers in this case and in *Allevato* would not "carve out" exceptions to the rule of *Illinois Brick* and *Hanover Shoe* for "particular markets," which the Court specifically rejected in *Illinois Brick*. 431 U.S. at 743-45. The Court in *Illinois Brick* was not cautioning against the pass on presented here and in *Allevato*, but was rather responding to an assertion by the indirect purchasers that the pass on theory should be permitted in certain markets where the economic conditions supposedly outweighed the policy considerations of *Illinois Brick* and *Hanover Shoe*.[11] In such situations, however, it was not clear that 100 percent of the burden of the overcharge fell on the indirect purchasers.

The Court can reverse in this case and in *Allevato* without inviting lower courts to engage in an exercise of line drawing or examining the economics of particular markets. Rather, the "line" presented here is quite clear and apparent from the nature of the relationship of persons along an economic chain of distribution, and thus would apply universally in all markets. No apportionment is necessary because we *know* that each and every penny of any overcharge *will* be paid by the end-users. *See Panhandle*, 852 F.2d at 898. When it is clear from the nature of a transaction (regardless of the market) that the direct purchaser cannot absorb any portion of an alleged unlawful overcharge, the direct purchaser cannot have standing to sue for the injuries sustained by paying such overcharge.[12]

[11]The indirect purchasers advocated creating exceptions for middlemen that resell goods without altering them, for contractors that add a fixed percentage mark-up to the cost of their materials in submitting bids or even for situations where "most" of the overcharge is passed on. *Illinois Brick*, 431 U.S. at 743-44.

[12]While the case at bar involves two state attorneys general suing in their capacity as *parens patriae*, the same issues are still at stake in *Allevato* because under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 15c (1982), citizens of a state must have standing in order for the state

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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attorney general to sue in its *parens patriae* capacity. *See, e.g., Illinois Brick*, 431 U.S. at 730 n.14 ("this legislation did not alter the definition of which overcharged persons were injured within the meaning of § 4."); H. R. Rep. No. 499, 94th Cong., 1st Sess. 9 (1975) (the section creates no new substantive liability; each person on whose behalf the state attorney general is empowered to sue already has his or her own claim under Section 4, even if it is not exercised). The court below recognized that, *parens patriae* standing is, in reality, indirect purchaser standing, stating:

> This appeal involves a single issue: May *residential consumers who are indirect purchasers* of natural gas maintain a antitrust suit against the alleged antitrust violators?

Tight Sands, 866 F.2d at 1288 (emphasis added).

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